THE ORGANIZATIONAL PREMISES OF ADMINISTRATIVE LAW

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I
INTRODUCTION

The core doctrines of administrative law have not taken account of developments in the theory and practice of organization. The contours of these doctrines were set in the mid-twentieth century when the Administrative Procedure Act (APA) was passed. Although these doctrines have evolved since then, administration itself has changed more. Many of the widely perceived deficiencies of the doctrines, including some associated with overregulation and others with underregulation, seem influenced by an anachronistic understanding of organization.

Much administrative law continues to understand public administration as bureaucracy. In particular, doctrine is strongly influenced by three premises. First, *the backward-looking conception of legitimacy* sees organization as instrumental to previously chosen values and goals. Authority thus depends on prior authorization. Second, there is *the balance between fixed rules and unreviewable discretion*. In the bureaucratic view, the rule is the most important type of norm. However, because rules are relatively inflexible and difficult to change, residual pockets of unaccountable discretion must be tolerated. And, third, is *the reactive approach to error detection*. Errors are understood to arise from idiosyncratic circumstances; they are addressed primarily through complaints, and complaints are understood to raise primarily issues of individual accuracy or fairness.

The model of organization these premises express is associated in the private sector with mass manufacturing of standardized products as it developed in the early and mid-twentieth centuries. The ideas developed in manufacturing influenced public administration, especially the Progressive and New Deal regulatory and social welfare programs. The designers of the APA were responding to these programs. This model was once the dominant paradigm of efficient large-scale organization, but it now competes with, and in some quarters has been displaced by, another one. This newer, postbureaucratic or performance-based approach has emerged in the private

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sector as industries have sought flexibility to adapt to more volatile economic circumstances and to the demand for more differentiated products. As reformers have recognized an analogous need for government to respond to fluidity and diversity, they have imported elements of the postbureaucratic view to the public sector.

In postbureaucratic organization, legitimacy depends less on prior authorization than on *transparency* and consequent openness to ongoing diffuse democratic pressures. The key type of norm is not the rule but *the plan*. Plans are more comprehensive than rules, and although plans may contain rules, as norms, they are more provisional and less categorically prescriptive than bureaucratic rules. Plans typically set out procedures for monitoring their own implementation and for frequent reassessment in light of information derived from monitoring. Whereas change in bureaucracy tends to be episodic, change in postbureaucratic organization tends to be continuous. Although they do not regulate as tightly as rules, plans do not create pockets of unaccountable discretion. Departures from a plan may be permissible, but they typically trigger review and require explanation. Finally, postbureaucratic organization takes a *proactive* approach to error detection: It tends to rely on audits more than complaints, and it takes a diagnostic approach to complaints, understanding them not just as evidence of idiosyncratic deviance, but as symptoms of systemic malfunction.

Part II of this article argues that administrative law doctrine reflects the older view of organization (1) in its often-obsessive preoccupation with statutory authorization and its relative indifference to transparency; (2) in treating rules and rulemaking as rigid constraints on administrative action in some spheres while tolerating wide unreviewable discretion in others; and (3) in understanding adjudication as a series of independent responses to idiosyncratic errors. This orientation fits poorly with regulatory and welfare initiatives that are premised on a different understanding of organization. In consequence, efforts to achieve administrative accountability are often heavy-handed or ineffectual or both.

The gravity of this charge depends on how we define "administrative law." As I have used it so far, the term denotes the text and judicial interpretations of the APA and associated constitutional doctrine on delegation and procedural due process. This doctrine is largely concerned with the role of the courts (1) in policing administrative rulemaking and formal adjudication and (2) in enforcing agency compliance with statutes and their own rules. The doctrine—which I call "canonical" administrative law—occupies the largest and most prominent positions in treatises and the casebooks. It coexists with other doctrines, but it is more integrally and densely elaborated than the others, and it is the doctrine academics find easiest to teach and test. This is the doctrine that part II argues is out of touch with performance-based organization.[1]

1. David Zaring refers to what I call canonical doctrine as "administrative law conventionally understood." He finds that it "misses a great swath of actual administration, in addition to what lawyers

However, the canonical doctrine represents only a small and, in some respects, arbitrary subset of the universe of law governing public administrative practice. Noncanonical elements of this broader universe strongly reflect the performance-based view. The anachronistic character of conventional doctrine is partly a function of the way in which the canon has been defined.

Part III demonstrates the emergence of performance-based organization in three bodies of doctrine that are typically ignored in accounts of administrative law, even though they are centrally concerned with administration. The first is a set of statutory directives concerned with administrative transparency, planning, and proactive error detection. A second body of noncanonical administrative law consists of initiatives through which the White House or agencies have used discretion to move agency practice in a performance-based direction. Finally, a third source of noncanonical authority has been developed by the courts in institutional-reform litigation—civil rights actions seeking to restructure public agencies or programs. As developed by the lower courts in recent decades, this doctrine is predominantly influenced by postbureaucratic conceptions of organization.

The interventions I characterize as performance-based span a range of structures. Some are relatively hierarchical, focused on static efficiency, and driven by individual choice or market mechanisms in a manner that has been characterized as "minimalist." Others are relatively decentralized, focused on learning, and driven by deliberative mechanisms in a manner that has been called "experimentalist." However, all converge in their rejection of core assumptions about organization made in canonical administrative law.[2]

Part IV concludes that canonical administrative law suffers in two broad respects from its inattention to performance-based organization. First, descriptively, the canon gives an arbitrarily truncated picture of the role of law in the administrative state. Second, normatively, its interventions are often poorly designed for the central task on which it focuses—judicial control of administrative action.

II

CANONICAL ADMINISTRATIVE LAW: BUREAUCRATIC ORGANIZATION

Canonical administrative law consists of the text and judicial elaboration of the APA and the related constitutional doctrines of separation of powers and

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do to affect it." David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 236 (2010). My argument supports this claim and suggests some of the reasons for the gap between doctrine and practice.

2. *See generally* Charles F. Sabel and William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011). *See also* Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC. REV. 691 (2003) (describing the supersession of command-and-control by regimes focused on output monitoring in some fields and on customized planning in others). Although Coglianese and Lazer use the term "performance-based" only in connection with output-monitoring, the term as used in this article includes both approaches.

procedural due process. Its most prominent concerns are the role of courts when reviewing administrative action and the procedural requirements of administrative rulemaking and adjudication. This authority can be demanding, but measured in relation to the range of administrative activity, it is quite narrow. It does not reach some of the most practically important official conduct.

Some of the most dysfunctional features of canonical doctrine—both the excessively burdensome ones and the excessively lax ones—are associated with its highly limited and increasingly anachronistic conception of public administration. This conception is reflected in the key themes of (1) the backward-looking conception of legitimacy; (2) the need to choose between fixed rules and unreviewable discretion; and (3) the reactive approach to error detection.

A. The Backward-Looking Conception of Legitimacy

The canonical authority tends to assume that the legitimacy of administrative action depends most fundamentally on prior authorization. In a democracy, the people are sovereign, but their only standard form of participation is voting in general elections. They choose representatives who make decisions on their behalf by enacting statutes. Although legislation is one step removed from the electoral decisions of the people, it carries the legitimacy of electoral warrant. Administrative action, on the other hand, is more than one step removed. As a result, its legitimacy depends on the ability to find some warrant in the steps closer to the electoral process. Most often, the quest is for some mandate in the decisions of the legislature. The President is an elected official, too, and presidential authorization may sometimes be adequate or necessary, but the dominant separation-of-powers conceptions most often make legislative authorization critical. Either way, we are dealing with what Fritz Scharpf calls "input legitimacy."[3]

The backward-looking conception can be contrasted to a view that sees democratic legitimacy in terms of oversight. Legislators define goals and set a framework for administration, but administrators are expected to pursue the goals in ways that the legislators cannot foresee. Thus, in addition to authorizing executive conduct in advance, the legislature also monitors and responds to such conduct after the fact. It can respond through both revision of authority and reallocation of resources. Similarly, electoral candidates take positions based on retrospective evaluations of administrative performance, and voters' electoral choices take implicit positions on such evaluations. Authorization gives administrative action input legitimacy, but when Congress or the electorate approves administrative action retrospectively, it recognizes "output" legitimacy. In the oversight perspective, the most central institutional concern is transparency. Transparency tends both to improve the quality of

3. FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE OR DEMOCRATIC? 6–10 (1999).

decisions and to facilitate accountability. It enables the legislature and the electorate to reverse or restrict decisions of which they disapprove. And it subjects administrators to the informal pressures of shame and pride that may contribute further to the alignment of practice with legislative and popular will.

Canonical administrative law is heavily preoccupied with prior authorization. It occasionally invokes oversight values, but, just as often, it is indifferent to or disdainful of them. To begin, the nondelegation doctrine—the usual starting point of treatises and courses on administrative law—purports to constitutionalize the principle of prior authorization by requiring a threshold of legislative specification. Because the courts have not been able to specify a threshold that would impose any practical limit on contemporary legislative activity, the doctrine has no direct effect as constitutional constraint, but it looms over the field as both forlorn hope and noble aspiration.

At the same time that the nondelegation doctrine exalts prior authorization, it rejects any role for values associated with oversight. For decades, commenters suggested that deficiency in legislative specification might be mitigated by administrative self-discipline through rulemaking.[4] Specification at the agency level would not amplify the connection to prior legislative acts, but it would make current practice more transparent and hence more open to ongoing appraisal. Yet, when an intermediate court pursued this suggestion, the nondelegation proponents on the Supreme Court emphatically rebuffed it, denying that nondelegation constraints entailed or could be satisfied by postenactment specification.[5] At the moment, the doctrine stands solely for backward-looking accountability, but without imposing any practical constraints that might further it.

These backward-looking concerns are evident in the textualist or formalist approaches that urge narrow interpretation of statutes. A basic argument of textualist or formalist proponents is that the farther judicial decisions depart from statutory text, the less confident we can be that those decisions have been authorized by the legislature. Courts must have authority to elaborate law, but the argument asserts that some consequences—notably, those that depart from traditional common law norms or that threaten constitutional protections—should only be imposed by the legislature. Refusing to construe ambiguous statutes to impose novel consequences is a way of protecting baseline common law or constitutional values from casual or unreflective impingement. There is wide disagreement over textualist methodology and over the domain in which it should be applied, but it is influential.[6]

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4. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 1–25 (1971).

5. Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 473 (2001) ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory.").

6. *E.g.*, Kent v. Dulles, 357 U.S. 116, 140–42 (1958) (applying strict construction to protect civil liberties); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–45 (1983) (urging strict statutory construction to protect common law values).

When the courts take a limited view of their functions under canonical administrative law, they frequently invoke backward-looking legitimacy. The most capacious and frequently invoked provision of the APA section on "scope of review" authorizes courts to set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7] Viewing the text alone, one might think that there are many ways that administrative action could be unlawfully arbitrary, capricious, or abusive other than by departing from legislative enactment. One might view the broad language as, in part, a mandate for the courts to develop a common law of administrative practice—or rather, to resume doing so, since prior to the APA, a large fraction of administrative law consisted of judge-made subconstitutional norms.[8] Often, however, the courts limit their role to ensuring that administrative action conforms to legislative authorization. Notably, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court rejected lower-court efforts to elaborate procedures that might serve oversight values.[9] The Court held that courts lack authority to require an agency to receive and consider evidence in a rulemaking proceeding beyond the duties mandated by the APA.[10] More generally, the courts often decline to review agency action where there is "no law to apply."[11] They say that where rules are too incomplete or ambiguous to permit an assessment of authority, there is nothing for them to do.[12]

On the other hand, there is a common law–like counter-trend in canonical administrative law, in which courts demand safeguards with little or no attention to statutory mandate.[13] This trend has an ambiguous relation to the backward-looking view of legitimacy. When the courts follow this trend, they require administrators to give consideration to specified interests and to provide reasonable explanations of their decisions (and when the explanations are not forthcoming, the courts intervene more directively). This requirement can be quite demanding, as in the landmark case *Motor Vehicles Manufacturers Association v. State Farm*, where the Court insisted that the agency demonstrate that its decision took account of concerns and alternative proposals raised by stakeholders.[14] The demand for reasonable consideration and explanation could be related to prior-authorization concerns. The explanation might assist the Court in assessing the conformity of the action in question to the governing

7. 5 U.S.C. § 706(2)(A) (2012).

8. Richard B. Stewart, *The Reformation of American Administrative* Law, 88 HARV. L. REV. 1667, 1671–76 (1975).

9. 435 U.S. 519, 558 (1978).

10. *Id.* at 548.

11. *See* Citizens to Preserve Overton Park, Inc. v Volpe, 401 U.S. 402, 410 (1971) (stating that the APA does not permit review where there is "no law to apply").

12. *See infra* notes 37–58.

13. *See generally* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

14. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983).

legislation. However, the oversight rationale for the requirement seems at least as strong. The explanation enables the legislature and the electorate to better perceive and assess official practice.

Some specific statutory and regulatory provisions that are plainly motivated by oversight values have been incorporated into the canon. The most important are those in the Freedom of Information Act (FOIA).[15] FOIA, however, seems peripheral to the main concerns of the canonical doctrine. It is in the canon mainly by virtue of the largely accidental fact that it was codified in the APA.

Although the reasonable-consideration-and-explanation doctrine and FOIA are important, they are also quite limited from an ambitious oversight perspective. The former applies most often in the narrow context of rulemaking, and although it is not in principle restricted to that context, the courts often decline to apply it in other contexts.[16] FOIA applies only to "records" that the administrator has chosen to create (or must create under other law); it does not affirmatively require the creation of records. Other APA provisions do require disclosure of basic information about the agency's organization, operations, and procedures.[17] But nothing in the statute requires the agency to generate and disclose information about, for example, the activities of its frontline agents or the general efficacy its efforts.

B. The Dialectic of Rule and Discretion

Portrayals of bureaucracy emphasize hierarchy and coordination through relatively inflexible rule. In this form of organization, decisions about goals and decisions about implementation are strongly separated. Decisions about goals are a matter of political choice. Decisions about implementation are technical matters. The primary tool of implementation is the rule. Rules are understood as both general (they apply across a range of situations) and narrow (they regulate only a specific dimension of each situation). Although the totality of rules for a given program within a bureaucracy reflects a coherent vision, individual rules can be applied unreflectively without reference to the larger understanding that unites them. Rules transmit upper-level decisions more or less mechanically.

Most accounts imply that rules are relatively stable over time. Stability is implied in the strong separation between conception (rulemaking), which occurs at the top, and execution (implementation), which ultimately occurs at the frontline. The distance between rulemakers and implementers suggests that it may take time for information about the effects of the rules to travel from the frontline to the top and for new rules to be effectively communicated from the top to the frontline.

Rule-enforced hierarchy is valued in the private sector for efficiency. It

15. 5 U.S.C. § 552 (2012); *see also* 5 U.S.C. § 552b (2012) (requiring certain agency meetings to be open to the public).

16. *See* cases cited *infra* notes 37–58.

17. 5 U.S.C. § 552 (a)(1).

minimizes dependence on the scarce capacity for complex judgment and the time consumed in coordinating activity. It is valued in the public sphere on democratic as well as efficiency grounds. The democracy point is that rule-based organization most effectively links administrative conduct to the decisions of elected officials, and hence, to the electorate. The understanding of public administration as presumptively rule-based was highly influential in the United States from the beginning of the twentieth century through the New Deal period.[18]

However, most versions of this understanding accord some room in rule-based organization for informal discretionary judgment. The view of government as a balance of rules and discretion was classically formulated by John Locke. His *Second Treatise of Government* emphasized the importance of checking arbitrary official power by subjecting it to "stated rules."[19] However, it recognized that unforeseen situations will arise where either the legislature has "given no direction" or "strict and rigid observation of the laws may do harm." In response, there must be a realm of "prerogative," which Locke defines as "nothing but the power of doing public good without a rule."[20]

Many modern views have qualified this notion with the hope that expertise can discipline informal judgment. But, to varying degrees, proponents of these views have tended to consider expert judgment to be inarticulate or ineffable and hence capable of only limited explanation and review. Progressive and New Deal theorists argued for a strong role for non-rule-governed expertise at the administrative summit and, in some cases, like child welfare, at the frontline. They thought of such judgment as structured but only in ways that were not readily demonstrable.[21]

After World War II, a further set of qualifications to the rule-governed character of public administration was increasingly accepted. Portrayals of "street-level bureaucracy" emphasized that rule departure by frontline officials

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18. *See generally* FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT (1900); LAURENCE E. LYNN, JR., PUBLIC MANAGEMENT: OLD AND NEW 79–101 (2006). On the classical view more generally, *see* FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911); MAX WEBER, ECONOMY AND SOCIETY 956–58, 973–74 (Guenther Roth & Claus Wittich eds., 1978).

19. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 405 (Peter Laslett ed., 1960).

20. *Id.* at 421, 425. The possible role of informal judgment enters Max Weber's formulation in the guise of the "England problem"—the question of how England was able to develop economically without the degree of rule-based administration that Weber thought important to successful capitalism. David Trubek, *Max Weber on Law and the Rise of Capitalism,* 1972 WIS. L. REV. 720, 746–47 (1972).

21. *E.g.*, James M. Landis, THE ADMINISTRATIVE PROCESS 148–51 (1938). Charles Reich caricatured the Progressive and New Deal proponents of the administrative state. He stated that the proponents believed in a "new kind of decision" as to which "checks and balances and other restraints . . . would not be relevant . . . ." Quoting John Griffiths, he continued: The 'administrative' decision was conceived of as that right decision which will be clear to an 'expert' if, without the help (they would have said, the hindrance) of criteria, standards, rules, etc., he confronts a vast array of raw data." Charles A. Reich, *The Law of the Planned Society,* 75 YALE L. J. 1227, 1235 (1966) (quoting John Griffiths). *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1977) (describing frontline discretion).

was pervasive and routine. Some departures were malign, resulting from the pursuit of deviant goals by the officials, but some amount of malign noncompliance was inevitable or even optimal, because it could be eliminated only at intolerable cost. Other departures were benign. They took the form of street-level judgments of the sort Locke's "prerogative" idea contemplated for top-level officials—judgments designed to mitigate the surface inflexibility of the rules in order to vindicate their underlying purposes. Two routes for improvement suggested themselves. Analysts could try to identify those areas in which rules could be tightened to eliminate street-level discretion without incurring excessive costs. Alternatively, the state might seek to influence the exercise of discretion in a more benign direction through recruitment or socialization of frontline officials.[22]

This bureaucratic view of administration as a matter of hierarchically imposed rules supplemented by unaccountable discretion should be compared to a newer understanding of organization that de-emphasizes hierarchy and seeks adaptability to context and changing circumstances at all organizational levels. The postbureaucratic understanding of organization rejects any strong distinction between decisions about goals and decisions about implementation. It views implementation, not only or even primarily as compliance with previously enacted norms, but also as a course of discovery and elaboration. If change in bureaucracy is episodic, in postbureaucratic organization, it is continuous.

In the postbureaucratic view, the paradigmatic norm is not the rule, but the plan. A plan is more comprehensive than a rule. It provides a general framework for a program. The plan contains specific norms, but they do not stand apart from the plan. It is expected that the norms will be applied in light of the plan at all levels. Plans may contain rules, but their most characteristic norms lack the categorical quality that the bureaucratic view attributes to the rule. A rule either applies or does not, and when it applies, it demands conformity. By contrast, plan norms are often presumptive; agents may be authorized to depart from the prescription when compliance would not serve the purposes set forth in the plan. Typically, however, they must signal and explain their departures in a way that triggers both administrative review of their conduct and reassessment of the rule.[23] Plans may also contain indicators,

22. JERRY M. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 145–71 (1983). Influential works on street-level bureaucracy include MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE (1980); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR (1968). An important earlier demonstration of the need for informal judgment in the private sector is ALVIN GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1964).

23. For example:

> If the individual actually performing the activity cannot or believes he should not follow the procedure governing that activity as written, he shall place the system/component into a stable and safe condition and inform the responsible supervisor. Situations such as this could occur if the procedure is found to be inadequate for the intended task, if unexpected results occur, or if two more procedures governing the activity conflict. The supervisor shall resolve the

which are intended to measure changes in performance over time or in relation to comparable institutions.

In addition, plans are provisional. A good plan provides for frequent or continuous reassessment of practices and goals. It provides for monitoring of the effects of practice in achieving its goals. The bureaucratic view sees monitoring as a way to ensure compliance with promulgated norms. The newer view sees monitoring, in addition, as a process of reassessing the efficacy of the practices these norms dictate.[24]

Both views of organization prescribe that the practices of the organization's agents conform to the organization's articulated norms, but for different reasons. The primary role of articulated norms in bureaucratic organization is to restrict discretion. Their primary role in postbureaucratic organization is transparency. When practice conforms to norms, an observer can read off what is happening from the norms. This facilitates reassessment and change by enabling agents in different positions in the organization to better perceive what practices are producing the results they observe. Hewing to articulated norms also facilitates public oversight and accountability.

Canonical administrative law reflects the influence of the bureaucratic view of organization in two ways: (1) in its preoccupation with the enactment or initiation of administrative measures and its relative indifference to their application or implementation, and (2) in its tendency to divide administration into realms of heavily regulated practice and realms of unaccountable

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> discrepancy in the procedure by either [determining that the procedure is in fact adequate or] submitting a procedure change.

INSTITUTE OF NUCLEAR POWER PLANT OPERATION, GOOD PRACTICE—CONDUCT OF OPERATIONS (July 1984) 18–19 (quoted in JOSEPH REES, HOSTAGES OF EACH OTHER: THE EVOLUTION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND 82 (1996); *see generally* William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes, in* LAW AND NEW GOVERNANCE IN THE E.U. AND THE U.S. (Gráinne de Búrca & Joanne Scott eds., 2006).

24. A convenient if crude distillation of the postbureaucratic view can be found in a slogan called the "Demming cycle." It prescribes as a paradigm for conduct at all levels of the organization: "Plan, Do, Study, Act." "Plan" entails a statement of general goals, means to achieve them, and indicators to evaluate progress in attaining goals. "Do" entails execution of the plan and connotes practice tightly configured to plan. "Study" entails examination, documentation, and analysis of experienced consequences in relation to anticipated ones and reassessment of the plan in the light of this experience. "Act" involves revision of the plan. The cycle operates continuously, and the activities occur at all levels of the organization. *See* GERALD J. LANGLEY ET AL., THE IMPROVEMENT GUIDE: A PRACTICAL APPROACH TO IMPROVING ORGANIZATIONAL PERFORMANCE 23–24, 97–104, 442–43, 454 (2009); JEFFREY LIKER, THE TOYOTA WAY: 14 MANAGEMENT PRINCIPLES FROM THE WORLD'S GREATEST MANUFACTURER 263–65 (2004). For two especially influential accounts of post-bureaucracy in the private sector, see PETER M. SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION (1994) and JAMES P. WOMACK & DANIEL T. JONES, LEAN THINKING: BANISH WASTE AND CREATE WEALTH IN YOUR CORPORATION (1996). For public sector applications, see DONALD KETTL, THE TRANSFORMATION OF GOVERNANCE: PUBLIC ADMINISTRATION FOR TWENTY-FIRST CENTURY AMERICA 33–150 (2002); Lynn, *supra* note 18, at 104–82; MARK H. MOORE, RECOGNIZING PUBLIC VALUE (2013). The convergence of public and private sectors is analyzed in Charles F. Sabel, *A Real-Time Revolution in Routines, in* THE FIRM AS A COLLABORATIVE COMMUNITY: RECONSTRUCTING TRUST IN THE KNOWLEDGE ECONOMY 106–56 (Charles Hecksher & Paul Adler eds., 2006).

discretion.

Strikingly, rulemaking is the only form of administrative—as opposed to adjudicatory—conduct extensively addressed in the APA.[25] Edward Rubin has emphasized that the statute virtually defines other forms of administration out of existence by characterizing all forms of agency "disposition" other than rulemaking as "adjudication" (and by then leaving largely unregulated all forms of adjudication not involving hearings).[26] An equally eccentric definition occurs in Executive Order 12,866, where "regulatory action" is said to mean action that "promulgates or is expected to lead to the promulgation [of a] rule."[27] This order mandates cost-benefit analysis and preannouncement White House review of regulations. It is the one executive initiative to achieve prominence in the canon (as measured by the attention to it in casebooks). It is innovative in some respects, but it is entirely conventional in its conflation of administration with the promulgation of rules.

For this specialized category of "regulatory action," the APA imposes procedures that are potentially quite demanding. The statute prescribes a "notice-and-comment" process whereby rules are announced; citizens are given a period in which to submit comments, and the regulator must consider and respond to the comments.[28] Applying "hard look" judicial review, courts have made demands for explanation and response to comments that create substantial risks of reversal for controversial rules. This process has been extended by the White House review required by Executive Order 12,866 and by a further stage in which Congress reviews and can abrogate the rule prior to effectiveness (though it rarely does so).[29]

The canonical administrative law regime provides a good deal of transparency and opportunity for public discussion. On the other hand, many believe that it goes too far, entailing pointless expense and permitting

25. *See* 5 U.S.C. §§ 551(6)–(7) (2012).

26. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative,* 89 CORNELL L. REV.95, 110–12, 123–31 (2003). Rubin continues, "[the APA provides] no foothold, no conceptual framework, for imposing requirements on most actions that [lie] beyond the ambit of rule-making and formal adjudication." *Id.* at 126. I have relied heavily on Rubin's critique of the limits of canonical doctrine, but his overall argument ignores the distinction between bureaucratic and performance-based organization that is central to the argument here. *See also* Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not,* 59 ADMIN. L. REV. 79, 98 (2007) (emphasizing that canonical doctrine is primarily about rulemaking and adjudication). The constrained vocabulary of canonical doctrine accounts for the fact that many agency decisions that resolve policy issues affecting large numbers of people are referred to in the canon as "adjudications." Proceedings on such matters as the licensing of power plants, the allocation of broadcast spectrum, or the authorization of bank mergers are often styled as adjudicatory. When this happens, the procedures are different, though typically no less elaborate than rulemaking. Like rulemaking, these procedures reflect a tendency to focus on initiation of policy as opposed to implementation.

27. Exec. Order No. 12866, § 3(e), 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012).

28. 5 U.S.C. § 553 (2012).

29. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 213–34, 665–66 (2011).

opportunistic delay by private parties.[30] The rule focus of canonical doctrine continues even after rules become effective. Courts require agencies to comply with rules in a broad range of situations, including when the agencies seek coercive enforcement against private parties and when they respond to requests for individual welfare benefits. Rules, once enacted, are often hard to change, since change normally requires going back to the rulemaking procedure.

However, the intensely controlled realm of rulemaking and rule compliance coexists with a more extensive realm of relatively uncontrolled discretion. If the doctrine is strict in some areas, it is strikingly permissive in others. To begin with, some important areas of government activity are exempted from rulemaking and other canonical safeguards. Notably, the administrative law of national security is full of "grey holes" and "black holes" that make it a weak mechanism of democratic accountability. The courts tend to dismiss challenges to practices that implicate national security on the grounds that they originate in the White House, which is not an "agency" subject to the APA; that they are within the statutory rulemaking exemption for matters involving a "military or foreign affairs function"; that they involve nonreviewable "generalized conduct" rather than reviewable "agency action"; or that they are "committed to agency discretion by law." Even where the courts reach the merits, they tend to apply a deferential "soft look" standard.[31]

More generally, although an agency is subject to extensive controls once it decides to make rules in an area where exceptions do not apply, it retains in many areas virtually unreviewable discretion as to whether to make rules at all. Rulemaking procedures apply to "legislative rules"—rules that represent the exercise of legislatively conferred discretion. What rules qualify for this designation is substantially a function of how the agency chooses to characterize the rule. Some organic statutes require rulemaking, but some do not. Even those that do require rulemaking leave the agency broad discretion as to a given rule's level of specificity.

As far as the APA is concerned, an agency is typically free to operate on the basis of interpretive rules and nonbinding "guidance" norms that do not require notice-and-comment.[32] Indeed, it is often free to dispense even with nonbinding

30. Stephen Breyer, *Judicial Review of Questions of Law and Questions of Policy*, 38 ADMIN. L. REV. 363, 391–92 (1986) (suggesting that strict review of rulemaking makes the agency more reluctant "to change the status quo"); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 158–80 (1997) (explaining how judicial review of rulemaking creates opportunities for strategic delay); Sidney A. Shapiro & Robert L. Glicksman, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004) (arguing that the regulatory process tends to be excessively focused on the "front end" and insufficiently capable of ongoing adjustment).

31. Adrian Vermeule, *Our Schmittian Administrative Law,* 122 HARV. L. REV. 1095, 1106–31 (2009).

32. *See, e.g.*, Hudson v. FAA, 192 F.3d 1031, 1035–36 (D.C. Cir. 1999); Warder v. Shalala, 149 F.3d 73, 79–83 (1st Cir. 1998); *see also* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 876–81 (2009); Peter Strauss, *The Rulemaking Continuum*, 41 DUKE L. J. 1463, 1466–68, 1472–73, 1480–81 (1992).

norms and leave matters to ungoverned frontline discretion.[33] Agencies also have broad freedom to announce new norms through adjudication, rather than through rulemaking.[34] True, an agency generally gets some benefits from enacting legislative rules. In principle, legislative rules qualify for *Chevron* deference, and they satisfy the notice requirements for coercive enforcement (though so can nonlegislative rules).[35] However, as we have noted, rulemaking often entails large costs. Canonical administrative law leaves the agency with extensive freedom as to how to balance benefits and costs.[36]

Where administrative action does not take the form of rulemaking or adjudication, judicial review is often minimal. In principle, review is not limited to rulemaking and adjudication. There is even a presumption of reviewability for all agency action,[37] but the presumption is easily rebutted for much activity. As Mariano-Florentino Cuéllar has said, "[R]eview remains either unavailable or fairly cursory for a massive range of discretionary decisions involving national security, foreign policy, immigration, domestic regulatory enforcement, public benefits, and investigation or prosecution."[38]

There is a general reluctance to review when the agency's alleged failure is passive rather than active. Notwithstanding the APA language that makes "failure to act" reviewable and that authorizes courts to "compel agency action unlawfully withheld,"[39] courts treat many forms of agency inaction as nonreviewable. In refusing to consider whether the Food and Drug Administration (FDA) had abused its discretion in failing to regulate drugs used in capital punishment, the Supreme Court explained, "When an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."[40] And an agency's failure to exercise its authority to enforce enacted law is generally a matter of unreviewable prosecutorial discretion.[41]

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33. *See, e.g.*, Miami Nation of Indians of Ind. v. U.S. Dep't. of the Interior, 255 F.3d 342, 348 (7th Cir. 2001) (stating in dicta that subordinate official's refusal to certify an applicant for tribal status not reviewable where the "executive branch has not sought to canalize the discretion of its subordinate officials by means of regulations").

34. *See* NLRB v. Bell Aerospace, 416 U.S. 267, 291 n.21, 294 (1974).

35. *See* Chevron, U.S.A. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984).

36. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Methods of Administrative Regulation*, 52 ADMIN. L. REV. 157, 165–70 (2000) (suggesting that increasing formality of the rulemaking process has induced greater resort to informal modes of regulation). In a study of the Department of the Treasury, David Zaring shows that canonical doctrine has little influence there because many activities are covered by statutory exemptions, and with respect to others, the department is able to avoid rulemaking and formal adjudication. *See supra* note 1.

37. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

38. Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229 n.2 (2006).

39. 5 U.S.C. § 706(1) (2012).

40. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

41. Ellison v. Connor, 153 F.3d 247, 251 (5th Cir. 1998) (holding Corps of Engineers decisions

As the doctrine plays out, it tends to minimize review of precisely those practices that the postbureaucratic view of organization regards as central—planning, monitoring, and reassessment.

1. Planning

Two revealing cases on planning arose under the Federal Land Policy and Management Act of 1976 (FLPMA). In *Lujan v. National Wildlife Federation*, an environmental group charged that the Secretary of the Interior was making decisions about the use of federal lands in an ad hoc manner that was both arbitrary and excessively deferential to mining interests.[42] It sought, inter alia, specific enforcement of the statutory mandate that the administrators "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands."[43] The Court held the claim not to be an "agency action" or "failure to act" reviewable under the APA:

> The [plaintiff's claim] does not refer to a single [Bureau of Land Management (BLM)] order or regulation, or even to a completed universe of particular BLM orders and regulations. [Rather, it challenges] the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA.[44]

Apparently worried that the claim would require courts to undertake comprehensive administrative direction, the Court insisted that the APA did not authorize "wholesale correction" of agency noncompliance but only challenges of "manageable proportions."[45]

The Court, per Justice Scalia, gave a textualist gloss to the point in *Norton v. Southern Utah Wilderness Alliance*.[46] This time, plaintiffs sought to compel the agency to implement a plan it had adopted under the FLPMA, requiring curtailment of off-road vehicle use on various federal lands.[47] Justice Scalia pointed out that the examples of reviewable "agency action" mentioned in the APA—"rule, order, license, sanction . . . relief"—all involved "circumscribed, discrete" actions and, applying the *ejusdem generis* canon, concluded that a broad failure to plan did not qualify.[48] He suggested that this interpretation was reinforced by the concern that judicial enforcement of such broad norms would involve inappropriate judicial intrusion into "day-to-day" agency management.[49]

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regarding applications to use Corps property unreviewable); Inv. Co. Inst. v. Fed. Deposit Ins. Corp., 728 F.2d 518, 525 (D.C. Cir. 1984) (holding agency's refusal to intervene to halt bank marketing practice unreviewable); Curran v. Laird, 420 F.2d 122, 128 (D.C. Cir. 1969) (en banc) (holding compliance with statute requiring that military supplies be shipped on U.S. vessels when available "committed to agency discretion" by law).

42. 497 U.S. 871, 879 (1990).

43. *Id.* (citing 43 U.S.C. § 1712(a) (1982)).

44. *Id.* at 890.

45. *Id*. at 873.

46. 542 U.S. 55, 67 (2004).

47. *Id.* at 60.

48. *Id.* at 62–65.

49. *Id.* at 67. The Sixth Circuit followed *Norton* in Am. Civil Liberty Union v. Nat'l Sec. Agency,

2. Monitoring

That the agency has unreviewable discretion with respect to enforcement decisions does not necessarily imply that the agency has such discretion with respect to decisions to monitor the conduct of those it regulates or of its own frontline agents. An agency that monitors effectively would have information that would tend to make its enforcement decisions more reliable and hence more worthy of deference.

Nevertheless, the courts tend to treat monitoring decisions as unreviewable. For example, the Sixth Circuit refused to entertain a suit protesting the failure of the Department and Health and Human Services (HHS) to collect data on the racial incidence of services provided by federally supported health care facilities.[50] The plaintiffs argued that the failure made it impossible for the government to enforce the nondiscrimination provisions of Title VI of the Civil Rights Act.[51] The court rejected the argument that monitoring decisions should be distinguished from unreviewable prosecutorial ones: "The mechanism by and extent to which HHS 'monitors' as well as 'enforces' compliance fall squarely within the agency's exercise of discretion."[52]

Canonical doctrine also holds that decisions of frontline personnel are not reviewable "agency action" under the APA unless the agency has chosen to review them, thus implying that there is no duty to review.[53] The same premise surfaces in the suggestion that it is a matter of agency discretion whether to "canalize the discretion of its subordinate officers" through rules, rather than leaving them to relatively ungoverned ad hoc decisions.[54]

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493 F.3d 644, 678–79 (6th Cir. 2007), *cert. denied*,128 S.Ct. 1334 (2008) (holding that National Security Agency practices of warrantless electronic surveillance are "generalized conduct" and therefore not "agency action" challengeable under the APA).

50. Madison-Hughes v. Shalala, 80 F.3d 1121, 1129–31 (6th Cir. 1996).

51. *Id.* at 1123.

52. *Id.* at 1125 (quoting Gillis v. U.S. Dep't of Health and Human Servs., 759 F.2d 565, 573 (6th Cir. 1985)). *See also* Sprint Comm'ns v. FCC, 76 F.3d 1221, 1231 (D.C. Cir. 1996) (holding FCC refusal to investigate particular matter not reviewable); Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. and Urban Dev., 170 F.3d 381 (3d Cir. 1991) (refusing to review HUD decisions regarding investigation of possible violations of rules on subsidized housing discrimination against handicapped).

53. Kixmiller v. SEC, 492 F.2d 641, 644–45 (D.C. Cir. 1974) (holding SEC "no-action" letter by lower-tier staff not reviewable because an "agency's decision to refrain from an investigation or an enforcement action is generally unreviewable," but stating that review might be available where, as in an earlier case "the Commission examined the staff's no-action determination and accepted it.").

54. Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior, 255 F.3d 342, 348 (7th Cir. 2001). Whether there is a general duty, constitutional or otherwise, to discipline lower-tier discretion through rules or guidance is, in fact, a mystery. Certainly there is no clear duty. The duty is sometimes denied. *See, e.g.*, Lightfoot v. District of Columbia, 448 F.3d 392 (D.C. Cir. 2006). Other cases have ordered the promulgation of rules or guidance, though both the scope of the duty and its source (whether based on the relevant organic statute, the constitution, or the APA) are typically ambiguous. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199 (1974); Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985)*; see also* Peter Strauss et al, *supra* note 29, at 821–26.

3. Reassessment

An agency has only weakly enforceable duties to reconsider its norms once promulgated. Although courts often take a "hard look" at legislative rules at the point of promulgation, they review decisions to leave promulgated rules in place softly. Where the agency volunteers a legal reason for inaction, the courts may review it, and where the agency itself initiates a proceeding to reconsider a rule, the courts may demand a reasoned explanation of the agency's failure to follow through.[55] But where the agency stands tacitly inert, intervention is unlikely.[56]

A recent Ninth Circuit case illustrates the influence of bureaucratic conceptions of organization on claims based on failure to reassess.[57] The Federal Central Valley Project, the largest water-management system in the country, operates under federal statutes that incorporate state standards designed to protect wildlife habitat. One such standard is the "Vernalis salinity standard" that imposes a limit on salinity as measured at a particular point in the system. The Project proposed to satisfy this standard by regulating certain flows under the "New Melones Interim Operations Plan." The plan, which had been adopted seven years earlier, "was initially intended to be temporary, but, for lack of a better program, the Bureau [of Reclamation had] continued to operate the CVP under [it] since its adoption." Projections in the plan indicated that the salinity standard would be exceeded in about one month out of ten. The plaintiffs argued that such a pattern would not satisfy the statute and sought relief compelling the agency to revise the plan. The court dismissed on the ground that the plaintiffs had not shown sufficient likelihood of harm: Their mistake, according to the court, was to assume "the Bureau's continuous and unswerving adherence to the Plan," whereas the Bureau regarded the plan merely as a "starting point" from which it would readily depart if necessary to satisfy the salinity standard. Accepting the Bureau's position, the court quoted Dwight Eisenhower: "Plans are nothing; planning is everything."[58]

The quoted language is a central maxim of the postbureaucratic view of organization, but the court misses the point. "Plans are nothing" means that one must be prepared to depart from the plan in response to unforeseen contingencies; it does not mean that an adequate plan can ignore foreseen contingencies. Before the contingency arises, it is the second part of the maxim that governs. If "planning is everything," then the agency should be struggling to provide as articulately and coherently as it can for key risks, and a court with responsibility for enforcing the statute should assess these efforts. The agency is not making adequate effort when it offers only a seven-year-old "interim"

55. *See* Massachusetts v. EPA, 549 U.S. 497, 533 (2007); Am. Horse Protection Ass'n v. Lyng, 812 F.2d 1, 6 (D.C. Cir. 1987). Where an agency does reassess, its decisions will often be immune to review if they do not involve revision or abrogation of a rule. *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182 (1993).

56. WWHT, Inc. v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981).

57. Cent. Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006).

58. *Id.* at 1025–27.

document that fails to address major known risks.[59]

Although this decision turns on the requirement of irreparable harm for injunctive relief, it is consistent with suggestions in other cases that provisional agency norms and nonbinding guidelines do not qualify as reviewable "final rules."[60] Such holdings seem to assume a world in which the key drivers of public programs—and hence the proper focus of judicial accountability efforts—are inflexible, hard-to-change rules that address relatively stable, well-understood problems.

4. Judicial Intervention: Compliance Versus Reasonable Consideration-and-Explanation

As noted earlier, the prior-authorization and oversight conceptions of legitimacy are associated with different forms of judicial intervention. The prior-authorization view is associated with narrowly prescriptive orders requiring compliance with enacted rules. The oversight view is associated with demands for reasoned consideration and explanation. Both modes of intervention appear in the canonical doctrine, but there seems to be a bias in favor of the former.

The courts' notion of justiciability seems constrained by the bureaucratic view of organization. Courts are most willing to intervene in connection with rules, which they tend to understand either as norms of the type governed by APA rulemaking or more generally as discrete and inflexible norms, whether promulgated by the legislature or by the agency itself. But when the courts encounter more general and provisional norms, they have a harder time conceiving of a role to play. As a result, in such situations, they often deny review, saying that there is "no law to apply," or that they cannot risk disrupting coherent administrative practices, or that they should not usurp legislatively conferred discretion. These rationales tend to assume that intervention would take a compliance-type form. They often do not make sense with reference to reasonable-consideration-and-explanation intervention.

A judicial demand for reasonable consideration and explanation need not be based on determinate substantive rules. As illustrated by *State Farm,* the courts can, without specific guidance from the organic statute, still ascertain that the administrator has exercised discretion on the basis of generally appropriate

59. Although, in principle, performance-based organization calls for rigor and precision, in practice its rhetoric of adaptation is often used to excuse laxness and vagueness. For example, J.B. Ruhl and Robert Fischman observe that in environmental protection "adaptive management" often degenerates into "'on-the-fly' management that promises some loosely described response to whatever circumstances arise." J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424, 441 (2010). *See also* Alejandro Camacho, *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 UCLA L. REV. 293, 316–48 (2007) (describing design and implementation failures in the Department of the Interior's Habitat Conservation Program under the Endangered Species Act).

60. *E.g.*, Norton v. S. Utah Wildlife Alliance, 542 U.S. 55, 69–71 (2004) (suggesting that the provisionality of the land use plans in issue might make them not "final" agency action and hence unreviewable under the APA).

public norms, that she has considered the legitimate interests and arguments of stakeholders, and that she has sufficiently developed and considered relevant evidence. Far from disrupting coherent administration, mandating reasonable consideration and explanation encourages the administrator to understand her decision as integral to a general plan. And to the extent explanation makes agency practice more transparent, it enhances legislative accountability.

The bias against reasonable-consideration-and-explanation intervention is evident in the Court's refusal to enforce the statutory land use planning requirement in *Lujan* on the ground that "respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[61] From outside the premises of the canon, this assertion seems to miss the point. The plaintiff purported to be enforcing the statute as enacted, not seeking revision. The "improvement" the plaintiff was seeking—reflection on and coherent articulation of general policy—would have facilitated legislative oversight and reconsideration, not preempted it. It would, of course, have required the Court to assess the adequacy of the plan. However, such assessment could have been made in terms of process norms if the statute provided no substantive guidance.

True, requiring reasonable consideration and explanation is not costless. It takes time and effort to produce explanations, and the courts will sometimes mistakenly decide that explanation has been inadequate and will thereby impose costs by inappropriately delaying administrative initiatives. But there is no reason to think such costs lower with compliance-oriented review. In many situations, specific enforcement of discrete rules is more disruptive and invasive than broader oversight-type intervention.

Forest Guardians v. Babbitt illustrates this point. Congress provided in the Endangered Species Act that the Secretary of the Interior must, within a year of designating a species as endangered, publish a rule specifying habitat critical to its survival.[62] However, the Secretary concluded that Congress did not appropriate sufficient funds to enable the Department to accomplish the task within the statutory deadline. In a rule designating the Rio Grande silvery minnow as endangered, the Secretary explained that the department was unable to meet the habitat deadline for this and other species. The Secretary then published a tiered schedule for working through its rulemaking backlog, ranking various projects in order of urgency. When environmentalists sued to force the Secretary to comply with the deadline for the silvery minnow, the court held that resource constraints could not justify a refusal to comply with "mandatory, nondiscretionary duties" imposed by statute and instructed the lower court to order the Secretary to promulgate a rule designating habitat for the silvery minnow "as soon as possible."[63]

61. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) (emphasis omitted).
62. 16 U.S.C. § 1533(b)(6)(C)(ii) (2012).
63. Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1999).

If the court had taken a reasonable-consideration-and-explanation view, it probably would have denied relief. The administrator's judgment about how to allocate scarce resources (a category of judgment which courts sometimes single out as entitled to exceptional deference[64]) was supported by a plan and by a reasoned, good-faith explanation that the plaintiffs did not challenge. The court could have interpreted the statutory command as implicitly qualified by the availability of sufficient resources, but the court instead read it in a textualist manner as a categorical injunction and ordered more or less strict compliance with it. Although the planning order sought in *Lujan* would not necessarily have interfered with the Secretary's ability to organize implementation coherently, this discrete compliance order had a high likelihood of doing so. Under the court's approach, the Secretary could be forced to obey a series of piecemeal instructions that do not reflect anyone's judgment about the proper allocation of scarce public resources, but simply the distribution of private litigation resources and the accidents of litigation timing.

5. Conclusion

The tortuous contours of reviewability doctrine reflect the presuppositions of the bureaucratic view of organization. Control is intense with respect to the form of administration this view treats as central—the rule—and relatively lax with respect to the forms emphasized by the postbureaucratic view—plans, monitoring, and reassessment. At the same time, the courts often assume a fairly rigid dichotomy between rule-based organization and unaccountable discretion. Where rule-based enforcement is not plausible, the courts often ignore the possibility of reasonable consideration-and-explanation accountability.

The doctrine seems dysfunctional. Rulemaking is overregulated, and rules are overenforced, whereas non-rule-governed activities are likely to be underregulated. The resulting incentives are perverse. Agencies that seek to make themselves accountable through rulemaking face high costs that they could avoid by resort to less transparent forms of administration. And courts are encouraged to focus their accountability-inducing efforts on the agencies that take the most initiative to make themselves accountable. But the need for intervention is likely to be less with such agencies than with those who do not make such efforts.

C. The Reactive Approach to Error Detection

The conventional understanding of bureaucracy assumes that administrative supervision eliminates most errors. But even with optimal enforcement, problems may remain because of an irreducible amount of random rule departures or because of idiosyncratic circumstances that do not fit the assumptions of the rule. These cases can be addressed through a backstop process. The backstop officials may operate under more flexible norms that

64. *E.g.*, Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

permit more individualized consideration than line administration. Greater discretion can be seen as a form of Lockean "prerogative" that mitigates the harshness of rules in unforeseen circumstances. Modern commenters also defend discretion to consider context as an expression of respect for the dignity of citizens affected by a rule.[65]

Consistency of decision across cases is not a central value in this perspective. The goal is either to fit the norms to idiosyncratic circumstances or to afford some subjective satisfaction to the individual claimant. Thus, the success of each resolution can be measured independently of its relation to decisions in other disputes or in line administration. In the private sector, the dispute-resolution task may be conferred on a specialized complaint department with authority to depart from the rules that govern line administrators. In the public sector, the task will be given to judges or administrative roles modeled on judges substantially independent of administrative supervision.

An objection to the focus on case-by-case fairness is that it slights the value of horizontal equity—that is, treating like cases alike.[66] Proponents of postbureaucratic organization have a further concern: Case-by-case resolution impairs transparency. Observers cannot infer decisions in disputed cases from the relevant norms. Even if the records of disputes are public, the overall quality and tenor of decisions can be assessed only by digesting the full records of large amounts of cases. Postbureaucratic organization tries to achieve transparency by hewing conduct to articulated norms. Transparency enhances accountability.[67] In addition, it facilitates redesign.[68] Postbureaucratic organization often deals with problems in which knowledge and circumstances are varied and volatile. In these situations, it often does not make sense to see errors as arising from idiosyncrasy. It is at least as likely that errors arise from the suboptimal design of the system. In that case, errors contain diagnostic information potentially relevant to systemic improvement. This information is lost in low-visibility, case-by-case problem solving. Thus, postbureaucratic industrial engineering forbids ad hoc, low-visibility responses to production glitches of the sort often found in accounts of both Taylorist production and street-level bureaucracy.[69] The paradigmatic response in postbureaucratic

65. *See, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

66. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1997–98, 2007–10 (2012).

67. THE ISO 14000 HANDBOOK 196 (Joseph Casio ed., 1996).

68. Productivity Press Development Team, STANDARDIZED WORK FOR THE OPERATOR 12 (2002) ("Only when you have standardization can you systematically improve your operations without creating chaos, and thereby gain adherence throughout your system when a better way is discovered.").

69. An example from industrial production is the arrival of an auto fender at a paint station with a small patch of dirt. The traditional response is either to paint over it and leave it for an end-of-the-line rework department or to improvise some intervention to clean it off with whatever materials are at hand. *See* John Paul MacDuffie, *The Road to Root Cause: Shop-Floor Problem-Solving at Three Auto Assembly Plants*, 43 MGMT. SCI. 497, 500–01 (1997).

organization is to "stop the line" in order to trigger a deliberation on the appropriate systemic reform to deal with the larger dysfunction symptomized by the glitch. Errors are treated diagnostically. If the enacted rules seem inadequate to address the problem, then the response is to rewrite the rules immediately. That way, practice continues to be readable from the rules.

Industrial production lends itself to a higher degree of normative specification than activities that require contextualized judgment, such as industrial risk assessment or social service design. However, postbureaucratic organization has found ways to achieve a measure of norm-governed transparency in sectors that depend on such judgment as well. The key is peer deliberation and review.[70] By discussing how the norms apply to particular cases, peers develop consistent understanding, or "inter-rater reliability." When the discussions incorporate people from other disciplines and institutions, they extend the range of reliable understanding.

Error detection in postbureaucratic organization is proactive in both a weak and a strong sense. In the weak sense, it uses audit-type procedures that induce reviews, rather than relying solely on complaints. If problems are learning opportunities rather than manifestations of irreducible idiosyncrasy, then there is good reason to seek them out. Such error-detection processes might involve merely superficial examinations of compliance with simple norms—"checklist" reviews. However, more ambitious efforts combine close examination of particular cases with systemic reassessment. Examples include the types of incident reporting associated with high-reliability industries like nuclear power or aviation or the mortality-morbidity reviews that examine unexpected bad outcomes in hospitals.[71]

The reactive view of error detection dominates canonical administrative law. The only form of error detection that figures in the canon is the adjudicatory hearing regulated in the APA and required in many situations by constitutional doctrine and organic statutes. The key convergent mandates of the APA and the Constitution are participation by the claimant and independence of the

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Here is a public-sector example from a nursing home inspection:

> We observed a Chicago sanitarian point out during an exit conference following an inspection that it is against the regulations to have a male and female in adjoining rooms sharing the same toilet. The sanitarian concedes that in this particular case neither resident is capable of using the toilet and that moving either of them would be upsetting to them. He says that he is going to turn a blind eye to the rule for the sake of the residents, but he warns management that someone else from the department could come along and cite them for this.

John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules Versus Standards in Nursing Home Regulation*, 4 SOC. & LEGAL STUD. 307, 329 (1995).

70. *See generally* Braithwaite & Braithwaite, *supra* note 69 (finding that judgments of nursing home inspectors are more consistent under the relatively informal Australian system than under the U.S. one, in part because discussion among inspectors leads to convergence).

71. ROBERT MARDER & MARK A. SMITH, EFFECTIVE PEER REVIEW: A PRACTICAL GUIDE TO CONTEMPORARY DESIGN (2005) (on unexpected outcome reviews in medicine); Rees, *supra* note 23, at 130–49 (on "significant operating event" reporting and analysis in nuclear power regulation).

decisionmaker.[72] Such hearings must be triggered by a complaint. Neither the APA nor the canonical *Goldberg v. Kelly* line of due process cases requires affirmative administrative efforts to identify errors.

Moreover, the separation of adjudication from line administration tends to be assumed or mandated in canonical administrative law. Line administrators do not treat hearing dispositions as precedents for their decisions. Just as an agency has no enforceable duty to acquire and consider information generally, it has no duty to follow up on systemically relevant information disclosed in adjudications.

Peer review, far from being mandated, is in some tension with the norm of independent decisionmaking. Administrative law judges (ALJs) tend to resist efforts to induce consistent decisionmaking by means other than case-by-case appeals of their decisions. They oppose mandated peer exchanges or broad performance assessments as interference with the norm of independence. Social Security ALJs have engaged for decades in "trench warfare"[73] with top administrators over efforts to induce more consistency in the ALJs' decisions, including a "[p]eer [r]eview" program.[74] The courts have recognized a "right of decisional independence" that gives the ALJs standing to challenge supervisory efforts.[75] Although no such efforts have been enjoined to date, the courts have expressed reservations about them.[76]

As a form of error detection, the canonical independent hearing has manifest limitations. First, in many contexts, people do not have the material or informational resources to identify and prosecute claims. Thus, many errors do not surface in the hearing process, and even if they surface, they may go

72. *See* 5 U.S.C. §§ 554(c), 557(d)(1)-(2) (affording claimants the right to present arguments and evidence, prohibiting decisionmaker from ex parte consultation and requiring that she not be under the supervision or direction of agency personnel with "investigative or prosecutorial functions"); *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) (holding that due process requires, prior to termination of certain welfare benefits, a hearing before an officer who has not participated in making the decision under review). *See also* 5 U.S.C. § 7521 (providing that specified adverse personnel actions against administrative law judges may be taken only for "good cause" as determined by the Merit Systems Protection Board).

73. JERRY MASHAW, RICHARD MERRILL, & PETER SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 463 (6th ed. 2003).

74. Nash v. Califano*,* 613 F.2d 10, 12–13 (2d Cir. 1980).

75. *Id*. at 15.

76. *Id.*; Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989); *see also,* Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1143 (D.D.C. 1984) (suggesting in dictum that another Social Security Administration effort to review adjudicatory decisions showed insensitivity to the decisional independence of ALJs). The initiatives challenged in these cases were more hierarchical and coercive than the term "peer review" usually connotes, and the courts seemed at least partly concerned that the agency was trying to decrease pro-claimant decisions in an unprincipled and intransparent fashion. Nevertheless, many of the plaintiffs' objections would have applied equally to less heavy-handed interventions. The history is summarized in Mashaw, Merrill, & Shane, *supra* note 73, at 461–67. *See also* PHILIPPE NONET, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY 212, 214–21 (describing the "development of a judicial ethos" among hearing examiners in a state workers' compensation program who resisted supervision and insisted that they should be "free to decide cases in accordance with our conscience").

unremedied there. For example, studies of some public assistance programs have suggested that only a small fraction of erroneous frontline decisions (as measured by audit-type review) surface in the hearing process. Such studies led Jerry Mashaw some decades ago to argue that effective review requires courts to recognize a "management side of due process," but the canonical doctrine has been unresponsive. The focus on case-by-case fairness means also that information discovered in the hearing process does not feed back to influence line administration.[77]

Second, some programs with large volumes of hearings have shown both high rates of reversals of line decisions as well as high variance among ALJs in adjudicatory decisional patterns. The most salient example is the Social Security disability program. Administrative denials of benefits are both appealed at a high rate (in many years, half or more) and reversed at a high rate—lately about two-thirds.[78] In one period, about a fifth of ALJs reversed denials of benefits at rates of one-third or below, and about a fifth reversed at rates of two-thirds or above. The high rates of both appeals and reversals of appealed decisions suggest that reversals are not a function of idiosyncratic factors that might generate errors even in a well-configured process of initial decision. They suggest that there is something systemically wrong about the line process. The variance among adjudicatory decisionmakers suggests that there is something systemically wrong with the hearing system. The Social Security Administration has sought to address these problems, but nothing in canonical administrative law obliges or even encourages it do so.[79]

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77. *See generally* Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of the Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974); *see also* JOEL HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 64–77 (1986) (arguing that the reactive "due process model" is generally ineffective in protecting beneficiary rights in welfare programs).

78. *Annual Statistical Report on the Social Security Disability Insurance Program, 2011*, SOCIAL SECURITY ADMINISTRATION 146, 148 (2012), *available at* http://www.ssa.gov/policy/docs/statcomps/di_asr/2011/index.html.

79. As another example, consider the limitations of administrative complaint systems as a response to police abuse.

> [E]ven if a significant number of complaints were to be sustained, there is no persuasive evidence that this would have a deterrent effect on other officers. [Moreover,] focusing on individual complaints tends to make rank and file officers scapegoats for police misconduct when such misconduct is the product of an organizational culture that permits it to exist. Recognizing this latter point, a number of experts on oversight argue that oversight agencies should focus on policies and procedures designed to change the underlying organizational culture.

Samuel Walker, *The New World of Police Accountability: The U.S. Justice Department's "Pattern and Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 24 (2003). *See also* Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, A Large Retailer, and Jails and Prisons)*, 2 J. OF TORT L. 44 (2008) (concluding that "it is rare in corrections that . . . information [from judicial petitions and administrative grievances] is used to strategize harm reduction").

III
NONCANONICAL ADMINISTRATIVE LAW

Most law that concerns public administration is outside the conventional corpus of administrative law. And much of this outside law assumes or enacts a different model of public administration from the one that dominates the canon. Performance-based organization is prominent in the noncanonical output of all three branches.

A. Statutes

Some noncanonical administrative law takes the form of general statutes that are not codified in the APA mandating practices across agencies and programs. A critical landmark is the Legislative Reorganization Act passed in 1946, the same year as the APA. The Act clarified committee jurisdictions, expanded staff, and committed Congress to "continuous watchfulness" over the executive branch.[80] Since then, legislative oversight processes have grown steadily into a vast set of preoccupying pressures on administrators. These processes put strong emphasis on transparency, planning, and proactive error detection.

Congress periodically forces administrators to produce information on public programs in connection with reauthorization and appropriations hearings and special investigations. It also mandates the routine provision of information on program operations, requiring extensive annual reports from federal officers. These requirements differ from the canonical requirements of FOIA in that they mandate not just disclosure of whatever information has been prepared independently, but affirmative efforts to generate and organize information.

While the aim of oversight is in part to ascertain officials' compliance with previously enacted statutes, it is also concerned with assessment of efficacy. A notable expression of this concern is the Government Performance and Results Act of 1993 (GPRA). The statute has been described as the "centerpiece of a statutory framework Congress put in place in the 1990s" to improve efficiency and accountability.[81]

The GPRA requires each federal agency to prepare a multiyear "strategic plan." The plan must set out a "comprehensive mission statement" as well as short- and long-term goals, a description of the process by which the goals were set, and an account of the factors on which attainment of the goals depends. The agency must annually create a "performance plan," indicating what progress it expects to make in the coming year and setting forth specific

80. 60 Stat. 812 § 136 (1946). Joel Auerbach calls the statute the "first formal congressional endorsement of oversight." JOEL AUERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 22 (1990). *See generally* Jack Beerman, *Congressional Administration,* 43 SAN DIEGO L. REV. 61 (2006); Walter J. Oleszek, CONGRESSIONAL OVERSIGHT: AN OVERVIEW (Congressional Research Service, 2011).

81. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 04-38, RESULTS-ORIENTED GOVERNMENT: GPRA HAS ESTABLISHED A SOLID FOUNDATION FOR ACHIEVING BETTER RESULTS 25 (2004).

"performance indicators" for measuring success. At the same time, it must produce annually a "program performance" report on the past year's operations, describing efforts to evaluate its activities, measuring performance against indicators, and describing actions needed to address unmet goals.[82] Amendments made in 2010 require the agencies to consult with relevant congressional committees in developing and revising their plans, and the amendments also require the Office of Management and Budget to consult with congressional committees on overall "federal priorities."[83]

General oversight processes also address error detection. One important oversight practice—"casework" in which congressional staff intervene on behalf of complaining constituents—resembles the adjudicatory processes of canonical administrative law by being reactive and complaint-driven (as well as opaque and devoid of diagnostic value). But oversight also includes notable proactive interventions. Congress engages in various forms of audit-type review through the Government Accountability Office (GAO). It also has institutionalized a general form of internal proactive error detection in the form of inspectors general, who conduct investigations and audits in more than seventy agencies. Under the Inspector General Act of 1978, they operate with substantial independence of the agency's line administration, and their reports go to Congress as well as to the agency leadership (and to the Attorney General in case of findings of malfeasance).[84]

Performance-based themes also can be found in program-specific forms in many (probably most) of the major regulatory and welfare initiatives enacted since the 1960s. The newer orientation can be illustrated with three statutes: (1) a social welfare statute, Title I of the Workforce Investment Act of 1998 (WIA);[85] (2) a civil rights statute, the Prison Rape Elimination Act of 2003 (PREA);[86] and (3) a health-and-safety statute, the Food Safety Modernization Act of 2011(FSMA).[87] The prior-authorization approach to legitimacy does not fit any of these statutes. They do not authorize specific conduct so much as identify problems and mandate efforts to explore them. The statutes are almost

82. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 31 U.S.C. §§ 1101 et seq.

83. GPRA Modernization Act of 2010, Pub. L. No. 111-352, §§ 2(b), (d); 5(a)(3); 31 U.S.C. §§ 306(b), (d); 1120(a)(3). Commenters suggest that the promise of the GPRA remains unfulfilled under current practice, in which agencies tend to adopt vague and undemanding goals and metrics, but that feasible reforms might make it a valuable process. Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 80 TEX. L. REV. 1741 (2008); GAO, MANAGING FOR RESULTS: DATA-DRIVEN PERFORMANCE REVIEWS SHOW PROMISE BUT AGENCIES SHOULD EXPLORE HOW TO INVOLVE OTHER RELEVANT AGENCIES (GAO 13-28, 2013). There is an interesting contrast between the lack of interest of recent presidential administrations in GPRA compliance and their intense preoccupation with upfront cost-benefit-analysis requirements.

84. *See* Shirin Sinnar, *Protecting Rights From Within?: Inspectors General and National Security Oversight,* 65 STAN. L. REV. 1027, 1035 (2012).

85. Workforce Investment Act of 1998, Pub. L. No. 105-220; 29 U.S.C. §§ 2801 et seq.

86. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79; 42 U.S.C. §§ 15601 et seq.

87. Food Safety Modernization Act of 2011, Pub. L. No. 111-353 (codified as amended in scattered sections of 21 U.S.C.)

entirely procedural. They aim to structure activities in ways that make them coherent and transparent. To be sure, some procedures are mandated in detail, and a court looking for "law to apply" might order an agency to comply with these procedural provisions. But the provisions reflect a very different view of administration than the canon, which treats as matters of presumptive administrative discretion the practices that these statutes regulate most intensely, in particular, planning, monitoring, and reassessment.

All three statutes endorse proactive planning. The WIA sets up a structure through which the Department of Labor makes grants to and supervises state Workforce Investment Boards, which in turn make grants to and supervise local boards. The state and local boards must each develop plans that show how they will address worker skill and knowledge deficits.[88] The PREA-implementing regulations prescribe that each federal and state agency that manages prisons engage in "responsive planning" that will produce, among other things, an investigative "protocol" for indications of sexual abuse and a "staffing plan" that will minimize dangers of abuse.[89] And the FSMA provides for FDA licensing of food-processing facilities: the key licensing criterion is that the facility has an adequate Hazard Analysis and Risk-Based Prevention Control plan.[90]

All three statutes also mandate monitoring. The WIA requires that the Secretary of Labor "provide for the continuing evaluation" of the state programs.[91] Both state and local plans must contain "performance accountability system[s]" in which the federal agency (in the case of the state plans) and the state board (in the case of the local ones) analyze data to determine that specified benchmarks have been met.[92] Among the "indicators of performance" to be assessed are the entry rates of participants into employment, job retention six months from graduation, earnings six months from graduation, and the receipt of licenses and certifications that enhance employability. States and localities are expected to develop additional indicators.[93]

The PREA creates a Review Panel on Prison Rape to collect data and produce an annual report.[94] The panel must rank facilities by incidence of rape after adjusting for such factors as population size and prisoner characteristics.[95] The Act also requires a plan for internal staff monitoring, including video monitoring. Every prison must be audited at least every three years by an

88. 29 U.S.C. §§ 2822, 2833 (2012).

89. 28 C.F.R. 115 321–22.

90. 21 U.S.C. § 350(g).

91. Workforce Investment Act of 1998 § 112; 29 U.S.C. § 2822.

92. Workforce Investment Act of 1998 § 118; 29 U.S.C. § 2833.

93. Workforce Investment Act of 1998 § 136; 29 U.S.C. § 2871. WIA also has provisions characteristic of federal grant programs requiring financial audits of state programs and private service providers. Workforce Investment Act of 1998 §§ 159(b)(2), 184(a)(5); 29 U.S.C. §§ 2899(b)(2), 2934(a).

94. Prison Rape Elimination Act of 2003 § 4(b); 42 U.S.C. § 15603(b) (2012).

95. Prison Rape Elimination Act of 2003 § 4(b)(2)(A); 42 U.S.C. § 15603(b)(2)(A).

independent "correctional monitoring body."[96]

The FSMA prescribes that the FDA inspect licensed facilities and prioritize inspections on the basis of risk. At the facility level, it mandates that the "owner, operators, or manager shall monitor the effectiveness of [plan] controls."[97] The FDA is charged with developing "performance standards."[98]

All three statutes also require that plans must be regularly reassessed and revised. When WIA benchmarks are not met, service providers must develop "performance improvement plans."[99] Repeated failure to achieve targets requires changes in state or local plans.[100] Under the PREA, facilities must, in connection with each investigation of indications of rape, consider whether the findings indicate a need for policy change. The FSMA requires that facilities that fail to achieve "zero tolerance" must periodically produce "corrective action" plans.[101] All facilities must engage in "periodic reanalysis" of their plans to ensure that they are "still relevant to the raw materials, conditions, and processes in the facility, and new and emerging threats."[102] With respect to imported food, the statute prescribes that U.S. authorities establish a "foreign supplier verification program" by which exporters can get expedited processing if they have demonstrated the efficacy of their safety measures. A key consideration in this assessment is the adequacy of the foreign country's food-safety system.[103] At the same time, the statute sets up processes for exchanging information and technical assistance between the United States and foreign regulators.[104] Since some foreign nations will be seeking reassurance about U.S. efforts, the arrangements seem to contemplate a kind of peer review among regulators from different nations.

Although the three regimes make use of complaint-initiated hearings,[105] they also emphasize proactive forms of error detection. The monitoring provisions just mentioned are proactive. In addition, the FSMA and PREA emphasize the diagnostic use of specific error analysis. PREA requires that the Review Panel on Prison Rape conduct annual hearings focused on the three best performing

96. Prison Rape Elimination Act of 2003 § 4; 42 U.S.C. § 15603(b); 28 C.F.R. 115.401–04.

97. Food Safety Modernization Act of 2011 § 103(d); 30fg(d); 21 U.S.C. 2201.

98. Food Safety Modernization Act of 2011 § 104; 21 U.S.C. § 2201.

99. Workforce Investment Act of 1998 § 112(b)(6), 29 U.S.C. § 2871(b)(6).

100. Workforce Investment Act of 1998 §§ 136(a)-(e); 172a; 29 U.S.C. §2871(a)-(e).

101. 28 C.F.R. 115.86, 115.93.

102. Food Safety Modernization Act of 2011§ 103(f)(5); 21 U.S.C. § 350g(f)(5).

103. Food Safety Modernization Act of 2011§ 301(c)(2), 303(b); 21 USC 384a(c)(2), 303b.

104. Food Safety Modernization Act of 2011§ 103(d),(e), (i); 21 U.S.C. § 350g(d), (e), (i).

105. Workforce Investment Act of 1998 §§ 122(g), 181(c), 184(a), 186; 29 U.S.C. §§ 2842(g), 2931(c), 2934 (providing for hearings for grantees faced with financial penalties and for disappointed applicants for some forms of assistance); Food Safety Modernization Act of 2011 § 104 (providing for hearings for facilities faced with termination of registration). The PREA does not explicitly require hearings (as opposed to investigations) on inmate complaints, but all state provide grievance procedures that, in principle, adjudicate complaints of mistreatment. Margo Schlanger, *Prison and Jail Grievance Policies, available at* http://www.law.umich.edu/facultyhome/margoschlanger/Pages/PrisonGrievanceProceduresandSamples.aspx.

and three worst performing facilities in the year's audit sample.[106] The hearings will naturally tend to focus on the causes and remedies for low-performing institutions. FSMA requires that the FDA develop "surveillance systems" for foodborne illness that can respond quickly to evidence of contamination.[107] The systems must have the capacity to "trace back" particular contaminated products through the supply chain to the source of the problem.[108] As we have seen, problems discovered in inspections typically lead to a "corrective action plan."[109]

It is ambiguous how strongly proactive these measures are. They clearly require the systemic generalization and diagnostic use of monitoring data. However, it is often less clear how much the monitoring will involve the close analysis of specific incidents that defines strong proactive error detection. The one provision in these regimes that clearly requires strong proactive behavior is the requirement in the PREA regulations for sexual-abuse-incident reviews. When one of these required investigations either finds sexual abuse has occurred or proves inconclusive, a team that includes senior managers must determine "whether the allegation or investigation indicates a need to change policy or practice to better prevent, detect, or respond to sexual abuse."[110] The team is specifically directed to consider what the incident reveals about the adequacy of building configuration, monitoring technology, and staffing.

There is no consensus on the efficacy of these three regimes. Appraisals of WIA are "mixed,"[111] and PREA and the FSMA have only recently been implemented. However, with a few exceptions, criticisms of the program do not take issue with their rejection of the "compliance orientation" but rather suggest that the proactive, diagnostic approach has been insufficiently implemented.[112]

106. Prison Rape Elimination Act of 2003 § 4(b); 42 U.S.C. § 15603(b); 28 C.F.R. 115.401- 405.

107. Food Safety Modernization Act of 2011§ 205(b); 21 U.S.C.§ 2224(b).

108. Food Safety Modernization Act of 2011 § 110(f); 21 U.S.C. § 2204(f).

109. Food Safety Modernization Act of 2011 § 102(b)(3); 21 U.S.C. § 374(b).

110. *Id*. 28 C.F.R. 115.186.

111. THE WORKFORCE INVESTMENT ACT: IMPLEMENTATION EXPERIENCES AND EVALUATION FINDINGS 44 (Douglas Besharov & Phoebe H. Cottingham eds., 2011). *See also* Workforce Investment Act: Strategies Needed to Improve Certain Training Outcome Data, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Jan. 31, 2014), *available at* http://www.gao.gov/products/GAO-14-137.

112. For qualifiedly optimistic appraisal of PREA, see David Kaiser & Lovisa Stannow, *Prison Rape: Obama's Program to Stop It*, NEW YORK REVIEW OF BOOKS, Oct. 11, 2012, *available at* http://www.nybooks.com/articles/archives/2012/oct/11/prison-rape-obamas-stop-it; David Kaiser & Lovisa Stannow, *Prison Rape and the Government*, NEW YORK REVIEW OF BOOKS, Mar. 24, 2011, *available at* http://www.nybooks.com/articles/archives/2011/mar/24/prison-rape-and-government. FSMA is still in the course of initial implementation, but a qualifiedly optimistic assessment of the Department of Agriculture's Hazard Analysis and Critical Control Point program for meat and poultry—in some respects a prototype for the FSMA regime—can be found in Committee on the Review of the Use of Scientific Criteria and Performance Standards for Safe Food, National Research Council, SCIENTIFIC CRITERIA TO ENSURE SAFE FOOD 133–75 (2003).

B. Executive Branch Initiatives

Even without congressional prompting, executive-branch officials often act to impose discipline on administrative processes.[113] Such initiatives have increasingly reflected performance-based principles. Some of them regulate administrative processes generally. We have noted that the most famous of these—Executive Order 12,866 requiring cost-benefit analysis—retains a bureaucratic flavor in its preoccupation with promulgation of regulations. However, one provision in this order has a distinctly performance-oriented tone: it mandates that regulations "to the extent feasible, specify performance objectives, rather than the behavior or manner of compliance that regulated entities must adopt."[114] President Obama's directive on "open government and transparency" is also in the spirit of performance-based administration.[115]

Performance-based principles are also salient in program-specific initiatives. Three examples are (1) the technical guide on "[a]daptive [m]anagement" of the Department of the Interior,[116] (2) the Reactor Oversight Process (ROP) of the Nuclear Regulatory Commission (NRC),[117] and (3) the Voluntary Protection Program (VPP) of the Occupational Safety and Health Administration (OSHA).[118]

The adaptive management guide sets out recommendations for planning and implementation in situations within the Department's responsibilities characterized by "uncertainty." Such situations arise in the management of public forests and parks, the design and operation of irrigation and dam projects, habitat conservation under the Endangered Species Act, and the preparation of environmental impact statements under the National Environmental Policy Act. ROP and VPP concern inspection and enforcement practice. They set out processes through which firms can reduce some burdens of regulatory oversight by demonstrating the reliability of their safety practices.

All three initiatives have only weak backward-looking legitimacy. They are

113. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Magill, *supra* note 32; JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW 285–316 (2012); Zaring, *supra* note 1.

114. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. §601 app. at 86–91 (2006 & Supp. V 2011)

115. *Memorandum on the President's Open Government Directive*, OFFICE OF MANAGEMENT AND BUDGET (Dec. 8, 2009), *available at* http://www.whitehouse.gov/open/documents/open-government-directive. For some of the fruits of this effort, see http://www.performance.gov (last visited Feb. 3, 2015).

116. U.S. DEPT. OF THE INTERIOR, ADAPTIVE MANAGEMENT (rev. ed. 2009) [hereinafter DOI Guide].

117. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1029, NUCLEAR REGULATORY COMMISSION: OVERSIGHT OF NUCLEAR POWER PLANT SAFETY HAS IMPROVED, BUT REFINEMENTS ARE NEEDED [hereinafter GAO NRC Report]; Nuclear Regulatory Commission, Revision of NRC Enforcement Policy, 65 Fed. Reg. 25368 (May 1, 2000) [hereinafter NRC Revision].

118. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-395, OSHA'S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY [hereinafter GAO OSHA Report]; OSHA, VOLUNTARY PROTECTION PLAN POLICIES AND PROCEDURE MANUAL (April 18, 2008) [hereinafter VPP Manual].

not derived from specific statutory provisions. The Department of the Interior's adaptive planning guide addresses circumstances where planning is mandated by statutes, but the guide's directions about how to plan are not derived from any statute. The NRC and OSHA initiatives have some resemblance to the monitored self-regulatory approach of the Food Safety Modernization Act, but unlike the food safety statute, the nuclear and workplace safety statutes do not mention such self-regulatory activities. The NRC and OSHA provisions cite as authority only vague substantive provisions, such as OSHA's mandate "to assure . . . safe and healthy working conditions," and provisions giving the agency discretion to seek penalties, including OSHA's authority to shut down plants it deems unsafe.[119] A GAO report on the NRC regime notes that it operates largely independently of "regulatory requirements"—that is, statutory and administrative rules.[120] In determining what demands to make on a facility, the agency takes account of conditions it deems dangerous even if they do not violate a rule. Conversely, a rule violation that does not affect safety is not counted for this purpose. In principle, only rule violations are subject to "enforcement actions" for civil and criminal penalties. On the other hand, any safety concern can affect "oversight." Since "oversight" determines not only the amount of inspection and remediation, but whether the plant is permitted to operate, it is at least as potent as "enforcement."[121]

Although they prove weak on backward-looking accountability, the three initiatives strive for forward-looking accountability through guidance designed to make agency activity more intelligible, disclosure requirements, and periodic engagement with stakeholders.[122]

The three regimes start with planning. With adaptive management, the agency invites a broad range of stakeholders to develop the plan. With the safety initiatives, the regulated firms develop their plans, and the agency reviews and certifies them. Monitoring is also a central theme. Adaptive management plans must specify "critical monitoring variables."[123] In the OSHA and NRC regimes, the regulators prescribe key indicators. Eligibility for reduced inspection under the VPP depends centrally on a firm's total case incidence rate and its "[d]ays, [a]way, [r]estricted and/or [t]ransfer [r]ate" (measures of accidents and their effects on work processes) relative to industry norms.[124] NRC tracks fifteen performance indicators. On the basis of these indicators, it ranks plants in four categories of risk. Higher risk classifications

119. *All About VPP*, U.S. DEP'T OF LABOR: OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, http://www.osha.gov/dcsp/vpp/all_about_vpp.html (last visited Feb. 3, 2015). NRC Revision at 11–12.

120. GAO NRC Report at 19.

121. *Id.* at 21.

122. DOI Guide at 23; GAO NRC Report, at 20–21, 28–29; GAO OSHA Report at 11. The transparency and participation themes are weaker in the OSHA initiative than the other two but still discernible.

123. DOI Guide at 12–15.

124. GAO OSHA Report at 3.

are inspected more frequently and intensely and demand more remedial efforts from operators. A key part of agency monitoring in the ROP and VPP is focused on facility self-monitoring. The agencies look to see not just whether there have been problems, but whether the regulated actors have themselves detected the problems.[125] Problems should lead to reassessment of the plan, so the agencies also evaluate the facilities on their capacity to revise their plans in response to evidence of inadequacy.[126]

Error detection in these regimes is proactive. Complaints do not play a prominent role in any of them. Aside from proactive monitoring, they sometimes take an ambitiously diagnostic approach to indications of problems. The adaptive management guide prescribes that the plan be based on a scientific model that includes predictions as to how the environment will respond to relevant interventions. The plan's "critical monitoring variables" should be designed to test these predictions.[127] The safety regimes prescribe both routine attention to designated indicators and "root cause analysis" of accidents or unexpected adverse events.[128]

Assessments of the three regimes suggest that their efficacy varies. The GAO has evaluated the NRC's ROP as generally successful. It has evaluated OSHA's VPP as seriously flawed, and critics have charged that some of the plans under the Department of the Interior's adaptive planning approach have been unsatisfactory.[129] Among GAO's criticisms of OSHA are that it fails to reassess VPP eligibility regularly or even after accidents at certified firms and that it has failed to develop effective indices of the program's effectiveness. A prominent criticism of adaptive management is that the adaptation idea is often used as an excuse for deferring even contingent resolution of key foreseeable issues. For example, water conservation plans may recite as goals the satisfaction of both environmental needs and agricultural demand, but these plans may also fail to specify what happens if and when either goal is not satisfied.

Two points should be noted about such failings. First, they do not impugn the move to performance-based organization but simply the failure to execute it properly. Second, these failings suggest a potential role for administrative law. Canonical administrative law is largely indifferent to planning, monitoring, reassessment, and proactive error detection. The residual *State Farm* duty of reasonable consideration and explanation is consistently applied only in connection with rulemaking. However, were the canon to try to take account of performance-based organization, a logical step might be to extend judicial

125. GAO NRC Report at 11 ("NRC bases its oversight process on the principle and requirement that licensees have programs in place to routinely identify and address performance issues without NRC's direct involvement."); DOI Guide at 33–34; VPP Manual at 21–36.

126. GAO NRC Report at 3–4, 14; VPP Manual at 34; DOI Guide at 35–38.

127. DOI Guide at 12.

128. GAO NRC Report at 14; GAO OSHA Report at 16.

129. GAO NRC Report at 14; Fischman & Ruhl, *supra* note 59, at 441.

intervention to failures of the kind the critics assert. The next subsection highlights how extreme instances of such failures sometimes lead to radical judicial intervention in the form of structural injunctions. However, there are often no judicial remedies for less extreme failures. A possible response would be to extend *State Farm* to hold that reasonable consideration and explanation often requires minimally adequate planning, monitoring, reassessment, and proactive error detection.

C. Judicial Initiatives

"[R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made,"[130] Justice Scalia wrote for the Court, denying relief in *Lujan*. In fact, there is an important category of cases in which courts entertain claims for wholesale improvement of public programs. In "public law" or "institutional-reform" litigation, the courts adjudicate claims of systemic official misconduct calling for relief involving administrative restructuring. Judicial decrees have reformed practices and processes of school systems, police departments, prisons, mental health institutions, child welfare systems, and other public agencies. Although this type of judicial practice remains controversial, it has proved durable and remains an important influence on many areas of government activity. In the Supreme Court's latest encounter with public law litigation, it affirmed, 5–4, a decree radically altering California's prison system, and only two of the dissenters—Justices Scalia and Thomas—raised objections that challenged the general legitimacy of structural decrees.[131]

These judicial interventions are intensely administrative. Sometimes they resolve substantive disagreements. But just as often, plaintiffs complain that the defendants are failing to respect substantive norms that all parties concede are binding. The judicial interventions tend to assume common patterns that are substantially independent of the particular substantive laws at stake and of whether the claims are statutory or constitutional.[132] In effect, they constitute an implicit common law of administration that is triggered by a showing of systemic failures of performance and accountability with respect to important rights or benefits.[133] In its most promising current configuration, this common law has little resemblance to canonical administrative law. Rulemaking and

130. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990).

131. Brown v. Plata, 131 S.Ct. 1910, 1921 (2011).

132. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981); Darryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

133. Where the substantive claims are constitutional, the remedial jurisprudence could plausibly considered "constitutional common law"—terms derived from the constitution but not specifically mandated by it and subject to revision and experimentation. *See* Henry Monaghan, *Constitutional Common Law*, 87 HARV. L. REV. 889 (1976).

individual hearings play only peripheral roles in it. Norms are revised too frequently for notice-and-comment rulemaking, and the approach to error detection is more proactive and diagnostic than that of adjudicatory hearings.[134]

Backward-looking legitimacy is hard to achieve in institutional-reform cases because the violation typically does not imply a unique remedy. Thus, critics charge that judges arbitrarily impose a particular administrative regime that usurps the authority of executive officials.[135] This might be a plausible criticism of some decrees in the once-favored command-and-control style,[136] but it is a mischaracterization of many decrees, and perhaps most recent ones. In the most promising recent cases, once liability is conceded or found by the court, the remedial regime is negotiated by the parties. The negotiated character of the relief does not make it consensual in any strong sense (even though the remedy is often called a "consent decree"). The court intervenes coercively. It forces the agency to engage with the plaintiffs both directly and indirectly—directly by ordering the agency to negotiate and indirectly by changing the balance of power.

The balance of power is changed through a "penalty default"—the threat that the court will impose a harsher sanction than either party typically wants in the event that the parties fail to agree. The default sanction might be the closure of a facility, large fines, monetary sanctions against individual defendants, or the appointment of a receiver.[137] It is a penalty default because, in most cases, it

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134. *See* Charles F. Sabel and William H. Simon, Foreword: *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1062 (2004).

135. *Brown*, 131 S.Ct. at 1953 (Scalia, J., dissenting) (complaining that structural decrees turn "judges into long-term administrators of complex social institutions"); *accord* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003).

Whether systemic relief should be regarded as more intrusive than the individual relief the critics would prefer depends on, in addition to the character of the systemic relief, whether individual relief would actually be available to all affected individuals. Without systemic relief, individuals with valid claims might lack the material, informational, or psychological resources to pursue their claims effectively, but the resulting administrative autonomy could not plausibly be viewed as a normative baseline. On the other hand, if we assume aggrieved class members could obtain individual relief, there is no reason to think that a series of individual orders would be less burdensome to defendants. Indeed the prospect of multiple orders would probably induce defendants to seek consolidated proceedings that might resemble the ones to which the critics object on their behalf.

136. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996) (reversing a prison-reform decree that, among other things, specified what books had to be in the prison library).

137. *See* Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance, in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 293–321 (Gráinne de Búrca & Joanne Scott eds., 2006).

> The prison population cap upheld in *Plata* combines features of a conventional remedy and a penalty default. It is conventional to the extent that it contributes more directly to the vindication of the relevant substantive rights to medical care than, say, a fine or official incarceration. On the other hand, it is a penalty default to the extent that its designers would have preferred that it induce negotiation of a more effective alternative rather than be specifically enforced. To the extent that it is a penalty default, *Plata* shows that specifically enforcing such penalties may sometimes be necessary when defendants persistently fail to perform. Even here, however, it is

does not represent the court's estimate of the most appropriate intervention, but the court's estimate of what will induce the parties to negotiate a better one. The court needs the parties to negotiate because they have better understanding of how to effectively change the institution and because some level of cooperation by the defendant will be needed to implement the intervention. Thus, legitimacy is substantially forward-looking. It depends on the capacity of the remedy to improve agency performance and increase accountability to the plaintiff class and the general public.[138]

Three cases illustrate the tenor of second-generation public law remediation. The first is the San Joaquin River Restoration Program, created by a consent decree in a case brought by environmental groups against state and federal officials involved in diverting and controlling water in the San Joaquin River. A central claim was that the defendants had harmed fish protected by the Endangered Species Act through excessive diversion for agricultural uses.[139] The second case is a challenge by racial minority group members and the American Civil Liberties Union to "stop-and-frisk" policing practices in the city of Philadelphia.[140] The case asserted unconstitutional racial profiling. And the final case is a suit on behalf of children by the National Youth Law Center against the Utah agency responsible for protecting abused and neglected children.[141] The critical claim was that the state systematically neglected its responsibility to provide reasonable care to children in its custody.

The police and child welfare settlements incorporate measures widely regarded as "best practices" and employed in other jurisdictions voluntarily or by virtue of other judicial orders.[142] The San Joaquin River decree is unusual in some respects, but its broad outlines resonate with the adaptive management

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> misleading to characterize the court's intervention as taking over management of the agency. As the majority pointed out, the order settles only one parameter, and the agency retains wide discretion how to comply with it.

Brown v. Plata, 131 S.Ct. 1910, 1941 (2011).

138. The court has occasionally insisted on the backward-looking perspective, demanding that the remedy be derived more or less rigorously from the violation. *E.g.*, Milliken v. Bradley, 418 U.S. 717, 746 (1974) (remedy must be limited to undoing the "incremental segregative effect" of proven discrimination). But later cases ignore this demand, perhaps because it is hard to translate into practice and potentially more disruptive than other approaches. *See* Sabel & Simon, *supra* note 134, at 1082–90.

139. Notice of Lodgment of Stipulation of Settlement, Nat'l Res. Def. Council v. Rodgers, Case No. S-88-1658-LKK/GGH, (C.D. Cal. Sept. 13, 2006) [hereinafter San Joaquin Notice]. Information on the program and its implementation can be found at www.restoresjr.net. The settlement was conditioned on federal and state funding that required legislative approval, which was in fact forthcoming. San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, §§ 1001-10203; California Propositions 13, 84 (2006).

140. Settlement Agreement, Class Certification, and Consent Decree, Bailey v. City of Philadelphia, C.A. 10-5952. (E.D. Pa. June 21, 2011) [hereinafter Philadelphia Agreement].

141. David C. v. Leavitt, 13 F. Supp. 2d 1206 (D. Utah 1998); Utah Department of Child and Family Services, The Milestone Plan (May 1999) (on file with author) [hereinafter Utah Milestone Plan]..

142. Walker, *supra* note 79; Kathleen Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform,* 34 LAW & SOC. INQUIRY 523 (2009).

procedures recommended in the Department of the Interior guide and commonly found in environmental restoration regimes.[143] The Utah child protective services case is the oldest. It was concluded in 2007, fifteen years after it was filed, when the parties stipulated that the remedial reforms had been successfully implemented. The other two regimes are still under construction.

Of the three decrees, only the River Restoration case purports to settle important substantive issues and contains extensive direction of primary conduct. There, the decree obligates the defendants to construct extensive physical improvements, such as bypass channels and fish ladders. It also sets out detailed standards for the operation of a large dam and other facilities to ensure minimum flows of water for fish and other species. Nevertheless, the decree contemplates that many issues will be worked out in the course of implementation.

The Philadelphia and Utah decrees contain virtually no substantive provisions other than recitations of general uncontested propositions (for instance, that police stops require "reasonable suspicion" or that the Utah agency is obliged "to provide for the protection, permanence and well-being of children and families in Utah").[144] The San Joaquin decree, in part, and virtually the entirety of the other two are concerned with establishing processes that will provide for coherent and transparent implementation and continuously elaborating standards to address new issues in ways that give assurance to the plaintiffs that their views and interests will be considered. The decrees are thus centrally concerned with plans, monitoring, and reassessment.[145]

The San Joaquin decree contains an overall plan for the restoration of the river. It also contemplates the development by the parties of future plans for such tasks as the reintroduction of salmon and the recirculation of water.[146] The Philadelphia decree requires the defendant to review all of its "training, supervision, and discipline policies" and to make appropriate changes after consultation with the plaintiffs.[147] The Utah decree incorporates an extensive "Milestone Plan" the parties developed that regulates client services

143. *E.g.*, Miami Nation of Indians of Indiana v. U.S. Dept. of the Interior, 255 F. 3d 342 (7th Cir. 2001); Ruhl & Fischman, *supra* note 59.

144. Philadelphia Agreement, *supra* note 140, at Part II (D); Utah Milestone Plan, *supra* note 141, at 5.

145. The San Joaquin decree has a connection to canonical doctrine, since it was styled as a challenge under APA sections 702-06 to action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Where a plaintiff's claim is based on a federal statute that does not provide a specific private right of action, plaintiffs typically appeal to the APA as support for reviewability. But very little in doctrine elaborating the APA explains or supports the complex, performance-based remedy in the case. By contrast, the remedy has much in common with remedies in institutional-reform cases brought under noncanonical authority, for example, 28 U.S.C. § 1983 (authorizing suits against state officers acting under color of law for violations of federal rights) or Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971) (finding an implied right of action against federal officials for violations of the bill of rights). The Philadelphia police case and the Utah child protective services cases were brought under section 1983.

146. San Joaquin Notice ¶¶14, 16, 17-19, Exhibit D.

147. Philadelphia Agreement 2(D).

comprehensively. The plan sets out a distinctive vision of social service administration. The center of the vision is an individualized case plan for each child constructed by an interdisciplinary professional team with family members and caretakers.[148]

All three decrees provide for monitors (called in the San Joaquin case "Restoration Administrator") chosen by the parties jointly. The monitor's role is to assemble and report information and to make recommendations to the defendants. There is an implicit (or in the San Joaquin case, explicit) duty on the part of the defendants to explain departures from the monitor's recommendations.

The San Joaquin decree specifies the six points on the river where flows will be measured, and more generally requires the development of guidelines for the measurement and reporting of releases.[149] The Philadelphia decree requires the city to review its reporting protocols for stops, in consultation with the plaintiffs, so that data needed to assess racial bias is included. The city is required to record the reports electronically in a searchable form and then to produce monthly reports for the plaintiffs. Philadelphia must also institute periodic audits by supervisors of a sample of specific incidents, periodic "department wide audits and assessments" of the policies, and "triggering thresholds for retraining, enhanced supervision, or discipline of officers."[150] About half of the ninety-one single-spaced pages of the Utah plan are devoted to monitoring. It specifies a range of indicators to be measured and reported and a series of "accountability structures" involving monitoring by both insiders and outsiders. At the casework level, among the key skills taught to workers and assessed in evaluations is "tracking" the circumstances of the child.[151]

Each of the decrees contemplates reassessment of norms and practices as part of the normal operation of the decree. The San Joaquin agreement is the only one that seeks to immunize some provisions—those that limit the amount of reductions to be imposed on farmers—from reassessment for an extended period (until 2025). But it contemplates that the monitor and the advisory committee will make recommendations on a host of other issues in response to monitoring data.[152] Philadelphia and the plaintiffs agreed that each would "review [monitoring] data and documentation under agreed upon benchmarks for measuring compliance" with applicable standards and submit reports and recommendations every six months to the monitor and the court.[153]

The Utah plan is the most insistent about the centrality of reassessment. All of its many monitoring processes are described as mechanisms to support transparency and reassessment. The key focus, it insists, is on the "self-

148. Utah Milestone Plan at 5–21.
149. San Joaquin Notice 13(g),(j).
150. Philadelphia Agreement II(C), (G); IV(c).
151. Utah Milestone Plan at 60–91; Noonan, Sabel & Simon, *supra* note 142, at 536–40.
152. San Joaquin Agreement ¶¶ 14, 16, 20.
153. Philadelphia Agreement IV(D).

correcting, continuous quality improvement." It continues, "The plan and the approach to monitoring make the performance feedback process more organic and developmental than deficiency finding [i.e., compliance assessment] alone." To coordinate re-assessment, the plan establishes regional Quality Improvement Committees "to study the data and outcomes children, families, and communities experience, and to suggest changes in resource deployment, policy, procedure, and practice."[154]

Institutional-reform remedies make use of the kind of proactive error detection that treats individual cases diagnostically. Viewed as a whole, the institutional-reform suit itself often exemplifies such error detection. When liability is contested, a central part of the plaintiffs' evidence usually explores a series of individual instances of violations. The plaintiffs argue that the court can infer from statistical evidence or evidence of general structure and practice that the individual cases are exemplary of more general phenomena and can make inferences from the cases about specific causes and effects of the systemic problems.[155]

These three examples differ in the extent that they are ambitiously proactive within the remedial structures. The San Joaquin decree does not mention error detection, although some forms of it might be appropriate, such as the diagnostic incident or "significant operating event" reviews performed in medicine and "high reliability" systems like aviation.[156] The Philadelphia police decree requires review of records of specific stops but it is unclear whether it contemplates aggregate "checklist"-type compliance analysis, on the one hand, or the close diagnostic analysis associated with the ambitious form of error detection on the other. Of course, the Philadelphia decree is part of a larger structure that includes both an administrative complaint process and lawsuits for damages. These processes could be used diagnostically, and in some regimes, they are.[157]

The Utah child protective services decree is notable in its attempt to combine rich exploration of individual incidents with systemic reassessment. The centerpiece of the regime is a Quality Case Review (QCR). The process begins with pulling a stratified random sample of cases. The cases are then intensively reviewed through both examinations of documents and interviews with the professionals, caregivers, and beneficiaries. The reviewers work in two-

154. *Id.*

155. *E.g.*, Floyd v. City of New York, Opinion and Order, 08 Civ. 1034 (S.D.N.Y Aug. 12, 2013) (combining detailed analysis of individual complaints with assessment of testimony on "institutional practices" and statistics to conclude that the city's "stop-and-frisk" practices are unconstitutional).

156. *See* sources cited *supra* notes 23–24.

157. For example, in a few cities, an independent board or agency "reviews complaints [against police officers] for the purpose of both identifying problems with the complaint review process and also of identifying the underlying causes of complaints and recommending the appropriate corrective action." Walker, *supra* note 79, at 25. Some cities integrate analysis of lawsuits into their "early warning systems" designed to identify officers who should be disciplined or subjected to greater supervision (though a larger number do not). *See generally* Joanna Schwartz, *What the Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012).

person teams, typically one from the state program office and the other an outsider from an NGO, university, or another state program. They spend two full days on each case. They score the case in terms of sets of metrics designed to assess both fidelity to established policy and the efficacy of the intervention. The criteria are qualitative. The system strives for consistency by demanding consensus within the team and by having teams meet with each other to discuss difficult judgments. Once the scores are set, each team meets with the case workers and their supervisors to discuss possible improvements in the handling of the case. Then review teams meet in larger groups with workers and administrators to discuss possible systemic reforms indicated by the reviews. The case scores are aggregated for the division as a whole and used as measures of overall performance. The idea of combing rich exploration of particular circumstance with diagnostic appraisal is expressed by one of the process' designers in the motto, "Every case is a unique and valid test of the system."[158]

In 2007, the plaintiffs and agency agreed that the Utah system was performing at a level that warranted termination of judicial supervision. In agreeing to termination, the plaintiffs relied on aggregate QCR scores and on the agency's commitment to continue the process. In the same year, an Alabama federal court decided to terminate judicial supervision of the Alabama child protective services regime, relying centrally on the same qualitative review process (designed in part by some of the same consultants involved in the Utah decree). In this case, the plaintiffs opposed termination, and there were disputes about the interpretation of its results. The court adopted the agency's interpretation, but in doing so, it treated the QCR process as both a central indication of the agency's level of performance and a basic safeguard of "substantial compliance."[159]

The claims in the Alabama case were both constitutional and statutory. Moreover, there were specific statutory procedures applicable to the program. The court, however, made little effort to distinguish constitutional from statutory requirements, and it largely ignored the statutory procedural provisions, instead focusing on the QCR, which had no statutory mandate. Thus, the court's ruling might be understood as part of a common law of responsible administration that entails duties to plan, monitor, and reassess. To be sure, the court did not use these terms, probably because appellate doctrine under section 1983 often purports to predicate liability on the state of mind of senior managers. Cases tend to speak of mismanagement not as a breach of duty in itself, but as evidence of illicit managerial intent.[160] This intent seems largely a fiction that functions only to link practice to a conception of public duty that predates the administrative state. In this conception, government is constituted by individual officers rather than institutions. Explicitly recognizing duties to administer responsibly would fit better with much current practice and

158. Noonan, Sabel & Simon, *supra* note 142, at 542–49.

159. *Id.* at 1134–39, 1177–80.

160. *E.g.*, Cash v. Cnty. of Erie, 654 F.3d 324, 334 (2d Cir. 2011).

might provide a more compelling justification for it.[161]

IV
CONCLUSION

The preoccupation of the canon with judicial control of administrative action now seems anachronistic and parochial. As scholarship and teaching increasingly acknowledge, many of the most important legal determinants of administrative action arise from (1) legislative action via statutes other than the APA, (2) executive initiatives only tenuously connected to rulemaking and adjudication, and (3) judicial practice in institutional-reform cases. These initiatives tend to have a structure quite different from that of the canonical doctrine. The differences in structure reflect differences in organizational premises. The canonical doctrine tends to presuppose bureaucratic organization. The noncanonical doctrine often arises from performance-based organization. Updating the canon thus requires broadening its focus.

It also requires reconsideration of the canonical approach to the issue with which the canon has been most concerned—judicial review of discrete administrative action. As Edward Rubin says, the APA needs redrafting.[162] But significant reorientation could occur without new legislation. Most of the canonical doctrine reviewed here arises from judicial interpretation of the Constitution and the general clauses of the APA (notably the "arbitrary, capricious" standard[163]) and a half-acknowledged exercise of common law powers. The argument above supports suggestions for reorientation along three broad lines.

First, judicial doctrine should be more attentive to oversight accountability.[164] It is not controversial that courts should enforce legislative decisions where there are legislative decisions to enforce. However, contemporary legislation increasingly addresses situations where neither the dimensions of the problems nor their solutions can be known in advance of intervention. Legislation thus becomes procedural and involves fewer decisions of the kind that generate substantive "law to apply." Courts should not try to squeeze determinate guidance out of texts that do not reflect any determinate understanding. At the same time, they should be more willing in situations of statutory ambiguity to intervene to require measures that reinforce political accountability. *Chevron* suggests the right sequence—consider whether the statute gives the agency discretion, and then, whether the agency has acted

161. *See* Gillian Metzger, *The Constitutional Status of Administration and the Duty to Supervise* 124 YALE L. J. (forthcoming).

162. Rubin, *supra* note 26, at 189. *See also* Robin Kundis Craig and J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1 (2014) (proposing statutory changes to accommodate adaptive management).

163. 5 U.S.C. § 706(2)(A).

164. *See* Sidney Shapiro, *The Enlightenment of Administrative Law: Looking inside the Agency for Legitimacy,* 47 WAKE FOREST L. REV. 463, 465 (2012) (arguing for more attention to "inside-out" legitimacy rather than "outside-in" legitimacy).

reasonably. But the latter step should be less interpretive and more procedural. It bears on reasonableness whether the agency has acted coherently, reflectively, and transparently.[165]

Second, doctrine should be less intensely focused on rulemaking and less deferential to non-rule-governed activity (in APA-speak, to informal adjudication). The burden of rule-focused review should be lessened, perhaps by eliminating pre-enforcement review or by more deference to procedurally adequate decisions.[166] At the same time, the courts should not leave non-rule-governed administration immune from "arbitrary-and-capricious" review. Recent judicial practice in structural reform cases shows that courts can intervene to enforce accountability without dictating the substantive terms of administrative practice. It also shows that courts can explicitly take into account the level of administrative dysfunction in deciding when intervention is appropriate. Canonical doctrine purports to rely on categorical indicators as to when intervention is appropriate. Structural reform doctrine, more plausibly, often insists on a showing of major dysfunction.

Third, appropriate error-detection efforts should not be framed exclusively in terms of duties of individual fairness to complainants. Responsible administration requires proactive efforts to identify and remedy errors, and it often also requires a diagnostic approach to error that seeks the systemic implications of particular problems.[167]

165. Chevron USA v. Natural Res. Def. Council, 467 U.S. 837 (1984); *see* Lisa Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1690–92 (2004).

166. *See* Mashaw, GREED, CHAOS, AND GOVERNANCE, *supra* note 30, at 106–81 (opposing pre-enforcement review); Peter Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community,* 39 UCLA L. REV. 1251 (1992) (arguing for more deference).

167. *See* Mashaw, *Management Side of Due Process, supra* note 77; Cuellar, *supra* note 38.